No. 90-814

In the Supreme Court of the United States

OCTOBER TERM, 1990

ASHLEY ELLIOTT, PETITIONER

v.

MERCURY MARINE, a Division of
Brunswick Corporation, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should hold this case on its docket for the indefinite future because the Alabama Supreme Court might issue a decision in another case that might be inconsistent with the court of appeals' rulings on issues of state law.

RULE 29.1 STATEMENT

Respondent Mercury Marine is a division of Brunswick Corporation. Brunswick has no parent corporations but has the following subsidiaries, excluding wholly-owned subsidiaries: Doellwood Financial, Inc.; Enhanced Energy Systems, Inc.; Intellitec International Inc.; Jewon, Co., Ltd.; Jiangxi Marine Company, Limited; Merc Spader, Inc.; Nippon Brunswick Kabushiki Kaisha; Nireco Corporation; Sugita Seisakusho Co., Ltd.; Texas Lounge Operations, Inc.; Texas Thousand Oaks, Inc.; Tohatsu Marine Corporation; and Wayne Recreation Center Lounge, Inc.

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STATEMENT

1. Petitioner Ashley Elliott was injured when she jumped from a pier at night into the water next to a boat and was struck by the rotating propeller on the boat's motor. The motor was designed and manufactured by respondent Mercury Marine. Boats like the one involved here, typically used for skiing and other recreational activities and typically operated at speeds exceeding 20 m.p.h., are generically known as "planing" pleasure craft. "Planing" refers to the fact that, as these boats pick up speed (to

approximately 20 m.p.h.), they rise up part-way out of the water and "plane" on the surface. Pet. App. 2a.

Petitioner claimed that Mercury violated Alabama tort law by not including a so-called "propeller guard" in the motor's design. This "propeller guard" would consist of a structure that in some fashion would surround the propeller. The evidence at trial showed that, despite substantial efforts of Mercury and others over many years to design such a device, no propeller guard existing and available at the time the motor was manufactured would have been a safer, practical, alternative design for planing pleasure boats, and that proposed guards are actually unsafe for use by the boating public.

Thus, witnesses for both sides testified that *no* boat manufacturer, boat motor manufacturer, or boating accessory manufacturer has ever been able to offer a propeller guard for planing pleasure boats for the purpose of protecting human beings from propeller contact. Pet. App. 11a; R4-185; R9-858. Use of such propeller guards is virtually unheard of anywhere in the world, except in a few special applications that are wholly unlike recreational planing boats.[1] Indeed,

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[1] Propeller guards are used in some parts of California, as well as in New Zealand and Australia, for life rescue operations conducted in high surf; at one time they were also used on certain United States Marine Corps landing craft operating in high surf. It is expected that life rescue boats or military landing craft would be stationary or moving at very slow speeds, as contrasted with planing pleasure craft operated frequently at high speeds. It is also expected that, in both circumstances, floundering human beings would be in the water near the turning propeller. Propeller guards are used

Dr. Arthur Reed, one of petitioner's expert witnesses, estimated that it would take some 15 man-years of effort by biomechanical, hydrodynamic, structural and materials engineers, followed by prototype testing, to design and manufacture a safe and feasible propeller guard. R4-168-169. He also acknowledged that every propeller guard currently proposed needed further technical development before it would be ready for use. Pet. App. 9a.

Furthermore, the United States Coast Guard, which is charged with exclusive responsibility for establishment of boating safety regulations (see 46 U.S.C. §§ 4301 *et seq.*), has rejected any requirement of propeller guards after extensively studying the question. Exh. 33 (1987 report). Similarly, as petitioner's witnesses acknowledged, propeller guards are not required by any states (R4-192; R8-608-611; R9-860-863) and are not required by the safety standards promulgated by responsible and authoritative boat safety organizations such as the American Boat and Yacht Council and the Society of Automotive Engineers. R4-192; R8-608-611; R9-860-863.

Finally, both parties' experts described numerous hydrodynamic, biomechanical and other dangers presented by propeller guards. Pet. App. 9a. These included:

- Substantial loss of power and hence speed due to added drag. R4-143, 149, 157, 175; R7-

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as well on slow-moving passenger boats in amusement parks. In addition, Outboard Marine Corp., one of Mercury's competitors, has developed a propeller guard for low-horsepower motors on non-planing fishing boats, which are expected to be used in shallow water containing underwater hazards such as rocks and stumps. Pet. App. 7a n.2.

516, 524; R9-943, 986, 993; R10-1036, 1050, 1068.

- Safety hazards due to consumers' likely removal of guards to gain added power and improved fuel economy; removal of the guard would cause the boat to exceed its power rating and would create handling difficulties. R9-986; R10-1056.

- Handling and steering problems because a guard, due to its circular shape, would add new rudder area in entirely new planes; additional rudder would create additional steering torque. R4-222-223, 263, 289-290; R7-483, 504-507; R8-712, 735-737; R9-981-982, 985-986, 994-999; R10-1046-1049.

- Improper handling resulting in increased risk that the operator or a passenger might be ejected from the boat, as well as the obvious risk of simply losing control and running the boat into another boat or the shore. R7-507.

- Dangers associated with breaking the guard and thus creating an additional set of steering problems. R7-525; R8-718.

- Dangers caused by the fact that a propeller encircled by a guard creates a surface area with which to strike a person in the water that is much larger than the unguarded propeller; the combined hazard of the propeller and guard moving through the water at moderate to high speed is at least as great as that created by the propeller itself. R7-474-479; R9-953, 984-985; R10-1037-1038.

- Injuries resulting from a "guard strike," which are often more serious than a propeller strike because a "guard strike" causes a

"crushing" blow or "blunt trauma"; such injuries are more difficult to repair than lacerations caused by a propeller, because a guard would cause smashing and tearing of nerves, muscles and bones. R7-480-481.

- Possible entrapment of a human limb between the guard and propeller, resulting in mutilation, amputation or drowning; were the guard not present, the propeller might miss the person altogether or make a glancing and relatively less severe laceration. R7-485; R8-735; R9-987; R10-1039.

2. Despite the overwhelming evidence that safe propeller guards for planing pleasure craft simply did not exist when this motor was built (and do not exist today), the district court allowed the case to go to the jury, which returned a verdict for petitioner in the amount of $1.5 million in compensatory damages and $3.0 million in punitive damages. Pet. App. 14a. The court of appeals unanimously reversed. *Id.* at 1a-11a.

The Eleventh Circuit began its analysis by setting forth the elements of a defective design claim under Alabama law. First, a plaintiff must prove that a product is "defective" in that it "does not meet the reasonable expectations of an ordinary consumer as to its safety." Pet. App. 4a, citing *Casrell* v. *Altec Industries, Inc.*, 335 So.2d 128, 133 (Ala. 1976). Second, a plaintiff must prove in addition that "a safer practical, alternative design was available to the manufacturer at the time it manufactured the [product]." Pet. App. 4a-5a, citing *General Motors Corp.* v. *Edwards*, 482 So.2d 1176, 1191 (Ala. 1985).

On the "consumer expectations" issue, the Eleventh Circuit based its analysis not only on *Casrell* but also

on two recent decisions of the Supreme Court of Alabama that ruled in favor of a product manufacturer as a matter of law. *Hawkins* v. *Montgomery Industries Int'l, Inc.*, 536 So.2d 922, 926 (Ala. 1988); *Entrekin* v. *Atlantic Richfield Co.*, 519 So.2d 447, 450 (Ala. 1988). Applying the teaching of these cases, the court below concluded that "the ordinary consumer clearly understands that a revolving propeller involves danger" (Pet. App. 5a) and that "the dangers inherent in Mercury's product should have been apparent to, or within the contemplation of," petitioner. *Id.* at 6a.

Additionally, the Eleventh Circuit held that petitioner failed as a matter of law to establish the existence and availability of a safer, practical, alternative design. The court of appeals noted that "although [petitioner's] experts promoted the use of propeller guards, they agreed that companies could not yet market them for general use. Both sets of experts, moreover, discussed the problems that these devices engender." Pet. App. 10a. Applying this uncontroverted evidence to the standard announced in settled precedent, the court concluded that "when [petitioner] failed to demonstrate the existence of a safer, practical propeller guard for use on planing pleasure boats, as required by the Alabama Supreme Court in *Edwards*, she failed to establish [her] claim." *Id.* at 11a.

Following the court of appeals' decision, petitioner filed a "petition for rehearing en banc" (see *Missouri* v. *Jenkins*, 110 S.Ct. 1651, 1661 (1990)), suggesting for the first time that the Eleventh Circuit certify to the Supreme Court of Alabama "questions concerning whether the obvious danger of an unguarded pro-

peller prohibits a cause of action under Alabama law" (Petition For Rehearing En Banc at 2). The court of appeals denied the petition on August 24, 1990.

3. At the same time that this case was proceeding in the Eleventh Circuit, another product liability case involving a swimmer injured by the propeller on a pontoon boat was pending in federal district court in Alabama. *Beech* v. *Outboard Marine Corp.*, No. CV-89-AR-0789-M (N.D. Ala.). Within days after the Eleventh Circuit issued its decision in this case, the plaintiff in *Beech*, who was represented by the same counsel as petitioner, filed a motion to certify certain issues of state tort law to the Alabama Supreme Court. Judge Acker, who also was the trial judge in this case, granted the motion on September 19, 1990, and certified five detailed questions to the state court. Pet. App. 19a-22a. The Alabama Supreme Court accepted the certification on October 11, 1990 (*id.* at 23a-25a), and the case is currently in the process of being briefed.

REASONS FOR DENYING THE PETITION

The petition for certiorari in this case is in flagrant disregard of the longstanding principle that "[t]he [certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923). Petitioner does not suggest that the court of appeals committed any error of federal law, much less that its decision conflicts with the decision of any other court. See S. Ct. R. 10. As petitioner concedes (Pet. 12), this diversity case is controlled by state law. Rather, petitioner contends that the Court should simply hold this case on

its docket for the indefinite future, because the Alabama Supreme Court might issue a decision in an unrelated case that might give the Eleventh Circuit grounds to reconsider its rulings on issues of state law. Petitioner's attempt to "warehouse" this case on this Court's docket is both unprecedented and inappropriate.

I. PETITION DOES NOT CONTEND THAT THE COURT OF APPEALS COMMITTED ANY ERROR OF FEDERAL LAW

One searches in vain through the petition for certiorari for any contention that the court of appeals committed any error of federal law, reached a result in conflict with the decision of any other court, or "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision" (S. Ct. R. 10.1). Petitioner does not make any such claim.[2] Instead, she acknowledges (Pet. 12) that, under *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), the dispositive questions in this case are entirely ones of *state* law.

Moreover, even as to the controlling state law questions, petitioner does not seriously contend that the court of appeals failed to abide by its obligation under *Erie* to follow decisions of the Alabama courts. To

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[2] Petitioner does suggest (Pet. 14 n.17) that the Eleventh Circuit might have "certified the unresolved questions [of state law] to the Supreme Court of Alabama," but she does not argue that the court below erred in failing to do so. The decision whether to seek certification rests in the sound discretion of the federal court. See *Lehman Brothers* v. *Schein*, 416 U.S. 386, 394 (1974). It is significant that petitioner did not request certification until after she had lost in the court of appeals.

the contrary, petitioner grudgingly admits that the "Eleventh Circuit did purport to rely on Supreme Court of Alabama cases in determining the relevant legal standard" (Pet. 17 n.21). She asserts only that the issues of Alabama law were "unresolved" (Pet. 12), that the "Eleventh Circuit travelled into uncharted waters" (*ibid.*), and that the "Eleventh Circuit was wrong in reversing, on state law grounds, the jury verdict and judgment in [her] favor" (Pet. 15).

As we explain below, the court of appeals properly applied state law to the facts of this case. But whether or not the court of appeals decided this fact-bound case correctly under Alabama law, the matter does not warrant further consideration by this Court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.10 (6th ed. 1986).

II. THE COURT OF APPEALS CORRECTLY DECIDED ISSUES OF ALABAMA STATE LAW

The bulk of the certiorari petition is devoted to the assertion that the court of appeals reached an erroneous result on an unresolved issue of Alabama tort law.[3] This Court, however, does not sit to review

[3] Petitioner also suggests that the Eleventh Circuit ignored Alabama authorities and rendered its decision solely on the basis of rulings from other jurisdictions. Thus, with respect to the consumer expectations issue, petitioner contends (Pet. 16; emphasis in original) that "[i]n concluding that, under Alabama law, an unguarded boat propeller is not dangerous beyond the reasonable expectations of an ordinary consumer, the Eleventh Circuit cited *no* Alabama authority." Similarly, with respect to the available alternative design issue, petitioner contends (Pet. 6, 18; emphasis in original) that "the Eleventh Circuit relied on no Alabama cases whatsoever"

questions of state law. See, *e.g.*, *Volt Information Sciences, Inc.* v. *Board of Trustees*, 109 S.Ct. 1248, 1253 (1989); *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979). In any event, petitioner is plainly wrong in suggesting that the decision below represents a departure from prior Alabama law.

As the Eleventh Circuit observed (Pet. App. 4a), Alabama case law recognizes a principle of product liability known as the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), based on *Casrell* v. *Altec Industries, Inc.*, 335 So.2d 128 (Ala. 1976), *Atkins* v. *American Motors Corp.*, 335 So.2d 134 (Ala. 1976), and Section 402A of the Second Restatement of Torts (1965). Section 402A provides in part that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property * * *." In *Casrell*, relying on comments g and i to Section 402A, the Supreme Court of Alabama defined "defective" to mean that "the product does not meet the reasonable expectations of an ordinary consumer as to its safety."[4] 335 So.2d at 133. Subsequently, in *Gen-*

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and that the "court cited *no* Alabama case law in support of its conclusion." As we explain in the text, these fanciful assertions are belied by the court of appeals' opinion, which cited and applied several decisions of the Alabama Supreme Court.

[4] Comment g states in part:

> [T]his Section applies only where the product is, at the time it leaves the seller's hands, in a condition not co-

eral Motors Corp. v. *Edwards*, 482 So.2d 1176, 1191 (Ala. 1985), the same court added that the plaintiff must also prove that a "safer, practical, alternative design was available to the manufacturer at the time it manufactured the [product]."

In this case, the Eleventh Circuit extensively considered this relevant Alabama authority and concluded that petitioner had failed at trial to establish both of these elements of her cause of action.[5] Petitioner may disagree with this conclusion, but that is a far cry from proving that, "instead of attempting to ascertain what Alabama law 'is,' the Eleventh Circuit apparently sought only to determine 'what it ought to be.'" Pet. 18.

A. Consumer Expectations

The court of appeals first held that petitioner failed to meet the "consumer expectations" test. In particular, the Eleventh Circuit concluded (Pet. App. 5a) that "[t]he ordinary consumer clearly understands that a revolving propeller involves danger." In support of this determination, the Eleventh Circuit relied upon Alabama law set forth in *Entrekin* v. *Atlantic Richfield Co.*, 519 So.2d 447 (Ala. 1988), and *Hawkins* v. *Montgomery Industries Int'l, Inc.*, 536 So.2d 922 (Ala. 1988).

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templated by the ultimate consumer, which will be unreasonably dangerous to him.

Comment i states in part:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

[5] Of course, Mercury would have prevailed in the Eleventh Circuit if that court had ruled in its favor on *either* point.

In *Hawkins*, the plaintiff was injured in the workplace by allegedly defective industrial machinery. In analyzing whether the product was defective, the Supreme Court of Alabama quoted at length from *Casrell* and Comments g and i of Section 402A in focusing on what was "expected" and "contemplated." 536 So.2d at 926. Applying the consumer expectations test of *Casrell* and Section 402A to the evidence in *Hawkins*, the court noted at least three times that the alleged defect was "contemplated." 536 So.2d at 925, 926. The Alabama Supreme Court accordingly concluded that there was not even a "scintilla of evidence" that the product at issue was defective, and it affirmed summary judgment in favor of the defendant. Here, the Eleventh Circuit closely followed the analytical framework set forth in *Hawkins* and likewise concluded that Mercury was entitled to judgment as a matter of law because "the ordinary consumer clearly understands that a revolving propeller involves danger." Pet. App. 5a.

Petitioner's attempted distinctions of *Hawkins* and *Entrekin* make little sense. She argues first (Pet. 17 n.21) that *Hawkins* "may not be applicable in the context of this case" because it involved a failure to warn. In fact, as the Alabama Supreme Court's opinion in *Hawkins* makes clear, that case involved alleged design defects: "[Plaintiffs] sued Montgomery Industries as the designer and constructor of the suction system, alleging that the system was defectively or negligently designed or constructed." 536 So.2d at 924. Indeed, the Alabama court's ruling on rehearing, which did deal exclusively with a warning issue, plainly recognized that the court's original opinion had decided a design issue. *Id.* at 927. Of course, even if *Hawkins* were exclusively a warning

case—and it certainly was not—petitioner has offered no reason to believe that it would be any less applicable as authority in a design case.

Petitioner next seeks to distinguish both *Hawkins* and *Entrekin* on the ground that she was a mere "bystander" rather than "the *ultimate consumer* of the allegedly defective product." Pet. App. 17 n.21 (emphasis in original). This effort to avoid the force of controlling Alabama authority also must fail. To begin with, the plaintiffs in *Hawkins* and *Entrekin* were employees who were injured in the workplace by products purchased by their employer; thus, they were "bystanders" at least to the same extent as petitioner. Moreover, by now claiming that she was a mere "bystander," petitioner seeks to "have her cake and eat it too" under the AEMLD and Section 402A. Section 402A permits recovery only by "the user or consumer." See page 10, *supra*. If, as petitioner now claims, she was a "bystander" and not a "user" or "consumer," then she may not recover at all under Section 402A. If, on the other hand, petitioner qualifies as a "user" or "consumer," and is thus eligible to sue under Section 402A, then she is bound by the ordinary "expectations" and "contemplations" that Alabama law attributes to such a plaintiff. Finally, petitioner has cited no authority under Alabama law that grants preferential treatment to "bystanders" injured by defective products.

Not only did the Eleventh Circuit base its decision on solid Alabama precedent that petitioner cannot successfully avoid, but the cases relied upon by petitioner (see Pet. 17 n.21) do not in any way detract from the decision below. Those cases are distinguishable because they hold only that, on their particular

facts, a jury question was presented regarding the defenses of assumption of risk and contributory negligence. It is a fundamentally different matter to hold, as the court of appeals did here, that a product is not defective as a matter of law because the danger is within the normal "expectations" or "contemplations" of a consumer. In addition, several of the cases cited by petitioner predate the Alabama Supreme Court's decision in *Hawkins* and thus would not be controlling authority even if they were in tension with *Hawkins*.

B. Availability of Alternative Design

Just as the court of appeals adhered to sound Alabama precedent on the consumer expectations issue, it similarly applied established Alabama law on the available alternative design issue. On this point, the Eleventh Circuit followed *General Motors Corp.* v. *Edwards*, *supra*, the same case principally relied on by petitioner not only before this Court but throughout this litigation. Pet. App. 8a-11a.

Although petitioner concedes the applicability of *Edwards*, she offers a strained interpretation of that decision, arguing that "feasibility" should be equated with mere technical and economic feasibility, apparently without regard for such other important factors as the safety of a proffered alternative design. See Pet. 20. However, the Supreme Court of Alabama clearly rejected that notion in *Edwards*:

> In order to prove defectiveness, the plaintiff must prove that a safer, practical alternative design was available to the manufacturer at the time it manufactured the [product].

482 So.2d 1176, 1191.

Based upon the standard announced in *Edwards*, the Eleventh Circuit carefully examined the testimony of both sides' experts, including their description of the numerous safety hazards created by proposed propeller guards, as well as current industry standards and federal regulations. In light of the undisputed evidence, the court of appeals determined that "the industry's adaptation of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate." Pet. App. 10a. Indeed, "the challenged designs are not even in a state of transition; at trial, even experts who promoted these guards agreed that their application was not yet possible." *Ibid.* Accordingly, the Eleventh Circuit concluded that a satisfactory guard was not yet available and that, "as required by the Alabama Supreme Court in *Edwards*, [petitioner] failed to establish a claim under" Alabama law. *Id.* at 11a. Once again, petitioner may disagree with this conclusion, but that hardly justifies her blatant misrepresentation that "the Eleventh Circuit relied on no Alabama cases whatsoever." Pet. 18.

III. THERE IS NO REASON TO HOLD THIS CASE ON THE COURT'S DOCKET PENDING A DECISION BY THE ALABAMA SUPREME COURT IN AN UNRELATED CASE

Having failed to show that the court of appeals' decision violates either federal or state law, petitioner urges the Court simply to hold this case on its docket for an indefinite period because the Alabama Supreme Court might reach a decision in another case that might give the Eleventh Circuit grounds to reconsider some of its rulings under Alabama law. We are not aware of any precedent that would support the warehousing of wholly uncertworthy cases on this Court's

docket because they might be affected by litigation pending elsewhere in the lower courts, and petitioner has cited none.[6] Indeed, the Court routinely denies motions to hold certiorari petitions in abeyance until some other event has occurred. See, *e.g.*, *Andes* v. *Knox*, 111 S. Ct. 373 (Oct. 29, 1990); *Kramer* v. *Hammond*, 111 S. Ct. 373 (Oct. 29, 1990); *Vaccaro* v. *Jorling*, 111 S. Ct. 397 (Nov. 6, 1990); *Grossman* v. *United States*, 59 U.S.L.W. 3392 (U.S. Nov. 27, 1990). Any other rule would be wholly inconsistent with this Court's certiorari jurisdiction and would serve only to encourage litigants to clutter the Court's docket with similar requests, in an effort to prevent adverse decisions from becoming final.[7]

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[6] The one case petitioner offers, *Gondeck* v. *Pan Am. World Airways, Inc.*, 382 U.S. 25 (1962) (*per curiam*), is hardly "analogous" (Pet. 13 n.16). The Court there granted an out-of-time rehearing petition and remanded a case in light of an *intervening* decision so that two men killed in the *same* accident would be treated equally under *federal* law. Here, there is no intervening decision, the issues involve state law, and the case now pending in the Alabama Supreme Court does not involve the same accident as this case. In any event, the Court's decision in *Gondeck* was sharply criticized when issued (see 382 U.S. at 30-31 (Harlan, J., dissenting)) and has never since been cited by the Court, much less followed. See *Weed* v. *Bilbrey*, 400 U.S. 982, 984 (1970) (Douglas, J., dissenting).

[7] For example, a party seeking review of an adverse decision in one court of appeals could suggest that the Court hold his case pending the decision of the same issue in another court of appeals, in the hope that a conflict in the circuits would develop. Or a party seeking review of a state law issue in a diversity case could suggest that the Court hold his case pending the decision of the same issue by a state trial court or intermediate appellate court in another case. Thus, petitioner's "fundamental fairness" argument would presumably apply equally if the *Beech* case were pending in the lower Alabama courts.

Even if petitioner's proposal were legitimate, this would not be an appropriate case. To begin with, the delay in ultimately resolving this routine tort suit is likely to be extensive. The case that petitioner would await, *Beech* v. *Outboard Marine Corp.*, No. 89-1815 (Ala. S. Ct.), was filed in federal district court in May 1989. Not until July 3, 1990, more than a year later and approximately one week after the Eleventh Circuit ruled for Mercury in this case, did Beech's counsel (who also is petitioner's counsel) seek certification of the state tort law issues, in an obvious effort to avoid the precedential force of the Eleventh Circuit's decision. The Alabama Supreme Court did not accept the certification request until October 11, 1990. Pet. App. 23a. Because the *Beech* case has not yet been fully briefed in the Alabama Supreme Court, much less scheduled for oral argument, it will be many months and perhaps longer before the state court renders a decision. We imagine that many losing litigants would relish the opportunity to have this Court put their adverse decisions on "hold" for a year in the hope that some intervening development would warrant reconsideration of their case.

What is more, petitioner drastically overstates the likelihood that the Alabama Supreme Court's decision in *Beech* would require an affirmance of the jury verdict in her favor. First, given the persuasive Alabama authority relied on by the Eleventh Circuit, there is every reason to believe that the Alabama Supreme Court will reaffirm the constructions of state law adopted by the court below.

Second, contrary to petitioner's repeated assertions (Pet. i, 3, 8, 12) that this case is "identical" to *Beech*, the plaintiff in *Beech* has in fact insisted that there are several material differences between the two cases.

In particular, the *Beech* plaintiff has contended that the Eleventh Circuit merely decided that there was insufficient evidence on *this* record to create a jury question, and that the evidence in *Beech* is far stronger:

> The factual question of whether the evidence was sufficient in *Ashley Elliott* to justify a verdict on the issue of feasibility under *Edwards* guidelines is not determinative of *this* case. In reaching its decision evaluating the evidence on feasibility, the Eleventh Circuit was reviewing an issue of fact, sufficiency of evidence, not of law. Hence the ruling of the Eleventh Circuit in *Ashley Elliott* does not mean that in this case, sufficiency of evidence of feasibility of propeller guards cannot be shown to support a jury verdict.

Brief In Opposition To OMC's Motion For Summary Judgment And In Support Of Plaintiff's Cross Motion To Certify Questions at 2, *Beech* v. *Outboard Marine Corp.*, No. CV-89-AR-0789-M (N.D. Ala.) ("*Beech* Opp.").[8] Because it serves his current purposes, petitioner's counsel is now singing a different tune.

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[8] The plaintiff in *Beech* emphasized the following factual differences between the two cases in opposing OMC's motion for summary judgment:

> Facts which distinguish this case from the case of *Ashley Elliott v. Mercury Marine*, relied upon in the OMC Motion for Summary Judgment, include the following:
>
> (1) Matthew Beech was eight years old at the time of this accident, whereas Ashley Elliott was fourteen years old at the time of her accident;
>
> (2) The contentions in the Matthew Beech case are that the marine engine involved in the case should have been equipped with a cage type guard. Testing and demonstrations, the subject of discovery in this case,

Third, the certified questions in *Beech*, as worded, do not in fact present the same issues decided in this case. For example, questions 1, 2, 4 and 5 all *assume* the existence of a feasible propeller guard (see Pet. App. 24a-25a), whereas the Eleventh Circuit expressly decided, based on the evidence introduced in this trial, that no such guard existed at the time this motor was manufactured. Thus, the certified questions in *Beech*, even if answered favorably to the plaintiff in that case, would not mandate a different result here.

Finally, even if the Alabama Supreme Court's decision warranted reconsideration of the Eleventh Circuit's decision, that would still not lead to upholding

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> show that a cage guard is feasible and prevents injury. Documents obtained from OMC, which were not available to the plaintiff at the time of the Ashley Elliott trial, show that a cage type guard was actually in use in Australia in the late 1970s, and had been tested by OMC on outboard marine engines of similar horsepower to that involved in this case. None of that evidence (which is the subject of a request for admissions in this case) was available on the feasibility issue in the Ashley Elliott trial;
>
> (3) The Beech case involves a 1988 engine. There is no question that it was technologically feasible to manufacture a guard for that engine prior to the time it was marketed and sold.
>
> * * * *
>
> The [Eleventh Circuit's] language "should have been apparent to, or within the contemplation of, Elliott" distinguishes, moreover, *Elliott* from the expectations of eight year old Matthew Beech. A minor cannot, as a matter of law, be required to have adult expectations of dangers.

Beech Opp. at 1-3.

the jury verdict. The Eleventh Circuit would then be obliged to consider Mercury's other substantial claims of error, which it had no occasion to reach in the first appeal. See Pet. App. 11a.

In sum, petitioner would send this Court on a fool's errand. It would pervert the Court's proper function to place this concededly uncertworthy case in a holding pattern for the indefinite future while the parties await a state court's decision on an issue of state law in another case, particularly when it is most unlikely that the state court decision would lead to a different outcome here. As this Court has reminded litigants on many occasions, the certiorari jurisdiction is reserved for issues that are "of importance to the public" and not just the "parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

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